

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-212581**DATE:** May 16, 1984**MATTER OF:** James L. Davis - Pay Adjustment
for Supervisors**DIGEST:**

1. Responsible agency official determined on January 8, 1982, that General Schedule employee of Forest Service was entitled to pay adjustment under 5 U.S.C. § 5333(b) as supervisor of wage system employee with higher pay rate. Employee may not be granted retroactive pay prior to official determination since entitlement to pay adjustment is within discretion of agency, and, absent mandatory agency policy, failure to grant pay adjustment does not constitute abuse of discretion which warrants compensation.
2. Responsible agency official determined on January 8, 1982, that General Schedule employee of Forest Service was entitled to pay adjustment under 5 U.S.C. § 5333(b). Under 5 C.F.R. 531.305(c), the adjustment is effective on the first day of the first pay period following the date on which the agency determines to make the adjustment. Since there was no mandatory agency policy to make the adjustment, and no abuse of discretion which warrants retroactive compensation, agency official erred in granting employee retroactive pay adjustment to February 8, 1981, to coincide with date employee certified his position description was not accurate.

Mr. James L. Davis, through his attorney, appeals our Claims Group Settlement No. Z-2837578 dated March 22, 1982, denying his claim for a retroactive pay adjustment as a supervisor of a wage system employee. We find nothing which

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establishes that the agency abused its discretion or acted improperly where it did not grant Mr. Davis a pay adjustment during the period in question. Accordingly, we sustain the determination of our Claims Group denying Mr. Davis' claim for retroactive compensation.

BACKGROUND

Mr. Davis is employed by the Forest Service, U.S. Department of Agriculture, as a Supervisory Forestry Technician at the Payette National Forest, McCall Ranger District, McCall, Idaho. On May 15, 1981, Mr. Davis filed a claim with his District Forest Ranger contending that he had supervised a wage system employee whose pay exceeded his rate since August 17, 1975. Mr. Davis based his claim on the entitlement provisions of 5 U.S.C. § 5333(b), and a decision of this Office, Billy M. Medaugh, 55 Comp. Gen. 1443 (1976). On June 5, 1981, the District Forest Ranger forwarded Mr. Davis' request - recommending approval based on the entitlement authorities cited by Mr. Davis - to the Forest Supervisor. On July 9, 1981, the Forest Supervisor forwarded the request - again, recommending approval based on the entitlement authorities cited by Mr. Davis - to the Regional Forester.

On July 31, 1981, the Deputy Regional Forester, Administration, advised the Forest Supervisor that, based upon their review, Mr. Davis did not qualify for backpay for supervising a wage system employee during the period claimed. Among the reasons cited by the Regional Forester were that (1) the duties in the pertinent position descriptions were more those of a working leader rather than a full supervisor; (2) the position descriptions did not establish either that Mr. Davis evaluated the performance of individual employees or that he was responsible for supervision and discussion of problems arising with specific work products of his unit; and (3) Mr. Davis did not satisfy the requirement of having "technical supervision and relatively frequent personal contact with the wage board employee in the unit." See generally the entitlement requirements set out at 5 C.F.R. § 531.304 (1983).

By letter dated September 4, 1981, Mr. Davis petitioned for a review of his claim providing detailed analyses of his position descriptions and job performance and enclosing statements of wage system employees he allegedly supervised. Mr. Davis also expressed his dissatisfaction with the Regional Forester's rejection of his claim which had

been recommended both by the District Forest Ranger and the Forest Supervisor. Again, the District Forest Ranger and Forest Supervisor forwarded the claim to the Regional Forester recommending approval.

On January 8, 1982, the Director of Personnel Management advised the Forest Supervisor that "since the supervisory duties, as assigned by management, are now reflected in the official position description, we have determined Mr. Davis is entitled to the administrative pay increase and backpay since February 8, 1981." Thus, the responsible personnel officer determined that Mr. Davis was entitled to a pay adjustment and backpay effective February 8, 1981 - the beginning of the pay period after Mr. Davis had certified his position description was not accurate.

Mr. Davis brought his claim for the additional period of retroactive pay adjustment as the supervisor of wage system employees to our Claims Group. The Claims Group's settlement reasoned that entitlement to a pay adjustment under 5 U.S.C. § 5333(b) is within the discretion of the agency. And, absent a mandatory agency policy, a failure to grant such pay adjustment does not constitute an abuse of discretion or error which would warrant compensation. Mr. Davis' claim was denied by the Claims Group on the basis that agency regulations provide for a discretionary rather than a mandatory increase.

Mr. Davis has appealed this adjudication contending that a proper reading of 5 U.S.C. § 5333(b), and section 615.13(b) of the Forest Service Manual establishes that the Forest Service did have a mandatory agency policy with respect to granting pay adjustments to employees who supervise wage system employees. Mr. Davis also alleges on appeal that there were specific individuals in the same region, who were similarly situated, and who received retroactive pay adjustments in similar circumstances. However, this unsubstantiated allegation of dissimilar treatment under a discretionary agency regulation, raised on appeal for the first time, does not provide a sufficient legal basis for payment of the claim and will not be further examined in this decision.

PAY ADJUSTMENT FOR SUPERVISORS

Under the authority of 5 U.S.C. § 5333(b) (1976), a General Schedule employee may be paid at a step rate above that to which the employee is otherwise entitled when the

employee supervises prevailing rate employees whose rate of basic pay is higher. The implementing regulations promulgated by the Civil Service Commission (now Office of Personnel Management) are set forth in title 5 of the Code of Federal Regulations, part 531, subpart C, and provide, in pertinent part:

"§ 531.303 Use of Authority.

"In determining whether to use the authority under section 5333(b) of title 5, United States Code, and this subpart, an agency shall consider (a) the relative rate-ranges of the supervisor and the prevailing rate employee supervised by him as well as the specific rate either is receiving at the time, and (b) the equities among supervisors in the same organizational entity as well as the equities between the supervisor and the prevailing rate employee supervised by him/her."

"§ 531.305 Adjustment of rates.

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"(c) Effective date. The adjustment of a supervisor's rate of pay under this subpart is effective on the first day of the first pay period following the date on which the agency determines to make the adjustment under section 5333(b) of title 5, United States Code, and this subpart."

Under the above-cited authority, the supervisor is not entitled to a pay adjustment based solely on a determination that he supervises prevailing rate employees who have basic pay rates in excess of the supervisor's rate of basic pay. The decision to grant an employee a pay adjustment under 5 U.S.C. § 5333(b) is within the discretion of the agency. Forrest C. Harris, B-193131, June 5, 1980; Dorothy R. Greathouse, B-191523, September 5, 1978. Thus, where there is no mandatory agency policy requiring the pay adjustment, a General Schedule supervisor whose pay is less than the pay of the wage system employees he supervises is not entitled to backpay. Forest C. Harris, cited above; Arnold J. Glaz, B-165042, December 21, 1978.

Decisions of this Office have permitted retroactive pay adjustments for such supervisors where the agency has failed to follow a mandatory agency policy which requires a pay adjustment under certain circumstances. For example, in Billy M. Medaugh, 55 Comp. Gen. 1443 (1976) as modified by 57 Comp. Gen. 97 (1977), we held that where Air Force regulations specifically provided that a request for pay adjustment must be initiated on behalf of a General Schedule supervisor of higher paid prevailing rate employees, the Air Force's failure to identify an employee as eligible for pay adjustment under 5 U.S.C. § 5333(b) constituted a failure to carry out a nondiscretionary regulation. The employee's pay should be adjusted retroactively and he should be awarded backpay. And in John O. Johnson, B-186896, November 2, 1976, the Bureau of Reclamation advised this Office that their policy requiring supervisors' pay adjustments under 5 U.S.C. § 5333(b) was directive rather than discretionary and that implementation of that policy was a mandatory requirement. This policy we concluded, had the effect of establishing an "automatic procedure" whereby an eligible supervisor receives the pay adjustment made available by section 5333(b) "no later than the first pay period following the application of a revised hourly pay schedule."

DISCRETIONARY AGENCY POLICY

In Mr. Davis' case the agency policy clearly comprehends a process of recommendation and certification that is neither automatic nor mandatory. Title 6100 - Personnel Management, of the Forest Service Manual implements the entitlement authorities contained in 5 U.S.C. § 5333(b), and 5 C.F.R. part 531, subpart C. Section 6153.13b of the Forest Service Manual provides as follows:

"6153.13b - General. It is the policy of the Forest Service within authority of the applicable law and regulations, to pay General Schedule supervisors at a rate in their grades above the highest rate paid to any wage employee under their supervision.

"Unit heads will recommend to the responsible personnel officer, or assistant for decision and action, such pay adjustments as appear to be in keeping with the law and regulations. In making such recommendations they shall consider:

"1. The relative rate ranges of the supervisor and the wage employee supervised, as well as the specific rate each is receiving at the time.

"2. The equities between supervisors, in the same organizational entity, as well as the equities between the supervisor and the wage employee supervised." (Emphasis added.)

We find this policy necessarily incorporates the application of discretion by the responsible personnel officer in considering judgmental factors involving "relative" rate ranges as well as "equities" between similarly situated supervisors and wage system employees. Such case-by-case evaluations can hardly be construed as mechanical in operation. The record shows that unit heads, the District Forest Ranger and the Forest Supervisor, recommended to the Regional Forester - the responsible personnel officer - that Mr. Davis should receive a pay adjustment under 5 U.S.C. § 5333(b). Under the entitlement requirements set out in 5 C.F.R. § 531.304, and the comparative assessment provisions of section 6153.13b of the Forest Manual, the responsible personnel official denied Mr. Davis' request on July 31, 1981. Incident to a request for review based on a reconstructed and augmented record, the Director of Personnel Management - the personnel officer entitled to make a binding decision and take final action under the agency's regulation - exercised his discretion on January 8, 1982, determining that Mr. Davis was entitled to the supervisor's pay adjustment.

In the absence of a mandatory provision, the decision to grant a pay adjustment is within the discretion of the agency. We have held that where agency action is committed to agency discretion, the standard to be applied by the reviewing authority is whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 54 Comp. Gen. 310 (1974). Based upon the record before us, we find nothing which would establish that the agency abused its discretion or acted improperly when it did not grant Mr. Davis a pay adjustment during the period in question. On the contrary, the record shows that the agency actively engaged in the determinative process involving recommendation, substantiation, and approval certification. That this process further involved differing opinions as to Mr. Davis' qualifications, and that

responsible agency officials ultimately changed their deliberative decision on Mr. Davis' case, demonstrates the exercise of discretion - not the abuse of discretion.

Accordingly, we sustain the determination of our Claims Group denying Mr. Davis' claim for retroactive compensation.

EFFECTIVE DATE OF ADJUSTMENT

After an agency initially decides to grant a pay adjustment under 5 U.S.C. § 5333(b), the implementing regulations at 5 C.F.R. § 531.305(c) provide that the effective date of the salary increase is the first day of the first pay period following the date of the agency determination.

This authority is consistent with the general rule that an administrative change in salary of a Federal employee may not be made retroactively effective in the absence of a statute so providing. See 40 Comp. Gen. 207 (1960); 26 Comp. Gen. 706 (1947). Thus, in 53 Comp. Gen. 926 (1974), an employee of one regional office of an agency complained that similarly situated employees in other regions were promoted, and that he would have been promoted also had officials of his region properly construed guidance from the agency headquarters. However, we held that there was no authority to award the employee a retroactive promotion, in the absence of a statute or nondiscretionary agency policy to that effect.

We have allowed retroactive salary adjustments where administrative errors or unjustified or unwarranted personnel actions have deprived an employee of a right granted by statute or regulation, or have resulted in a failure to carry out nondiscretionary administrative regulations or policies. In the Medaugh case cited above, the employing agency admitted administrative error in its failure to comply with a mandatory administrative regulation. Upon discovery of the error, a notification of personnel action was processed retroactively to effectuate his entitlement to the adjustment. We held this action was consistent with the Back Pay Act, 5 U.S.C. § 5596, which provides backpay for the period of the wrongful reduction in benefits. In Mr. Davis' case, while the record is generally supportive of his assertion of supervision, there has been no finding that the agency failed to follow a mandatory agency policy requiring the supervisory pay adjustment under specific circumstances. Nor has there been any finding that the agency in any way abused its discretionary authority under section 6153.13b of the Forest Service Manual.

Thus, it follows that there has been no administrative error in denying the pay adjustment and no wrongful reduction in Mr. Davis' benefits. The retroactive remedy provided by the Back Pay Act, 5 U.S.C. § 5596, is inapplicable to Mr. Davis' claim.

As a result, under 5 U.S.C. § 5333(b), and 5 C.F.R. § 531.305(c), Mr. Davis' pay adjustment should have been effected for the first day of the first pay period following January 8, 1982 - when the agency finally and formally determined to make the adjustment. The agency incorrectly determined to retroactively set Mr. Davis' pay adjustment to February 8, 1981 - when Mr. Davis certified his position description was not accurate. Accordingly, the agency should take appropriate action to recoup the resulting erroneous overpayments, taking into account the equitable waiver provisions of 5 U.S.C. § 5584.

for Milton F. Aorolan
Comptroller General
of the United States